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11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 UNITED STATES OF AMERICA,) NO. CV 09-2398 RGK (RZx)
15)
Plaintiff,) GOVERNMENT'S NOTICE OF MOTION
16) AND MOTION FOR AN ORDER
v.) APPROVING FINAL DISTRIBUTION OF
17) THE DEFENDANT SEIZED ASSETS ON
\$6,874,561.25 IN FUNDS FROM SIX) A PRO-RATA BASIS; MEMORANDUM OF
18 WELLS FARGO BANK ACCOUNTS, et) POINTS AND AUTHORITIES IN
al.,) SUPPORT; DECLARATIONS IN
19) SUPPORT
Defendants.)
20 _____) DATE: August 8, 2011
TIME: 9:00 a.m.
21 COURTROOM 850

22 PLEASE TAKE NOTICE that on August 8, 2011, at 9:00 a.m., or
23 as soon thereafter as the matter may be heard in Courtroom 850
24 before the Honorable Robert G. Klausner, United States District
25 Judge, located in the Roybal Federal Building, 255 E. Temple
26 Street, Los Angeles, California, plaintiff United States of
27 America will and hereby does move for an Order Approving Final
28 Distribution of the Remaining Defendant Seized Assets on a Pro-

1 rata Basis.

2 To summarize the motion: Pursuant to this Court's prior
3 order, the government has already distributed approximately \$9.2
4 million of the seized funds to the majority of the investors
5 (those whose losses were finalized as of January 21, 2011). Now,
6 the remaining investors have been finalized, in one of three
7 ways: (1) they have agreed that the Special Master's calculation
8 of their losses is correct, that they will not file a court claim
9 in this matter, and that they will accept a pro-rata distribution
10 of seized funds (pending court approval); (2) they did not agree
11 with the Special Master's calculation, but are time-barred from
12 filing a claim in court to contest forfeiture, and therefore
13 their loss calculations are also final; (3) they have not
14 responded to mailings, further mailing attempts are futile, and
15 the Special Master's calculations for them should be considered
16 final. The government and the Special Master agree and recommend
17 that the remaining funds be distributed to the pool of investors
18 at this time, on a pro rata basis equal to 36.93% of finalized
19 loss.

20 This Motion is based upon this Notice of Motion and Motion,
21 the Memorandum of Points and Authorities, the Declarations of
22 Monica Tait, Mark Trachtenberg, and Lillian Lee attached thereto,
23 other facts appearing in the Court's file, and upon such further
24 evidence, oral or documentary, as may be presented prior to or at
25 any hearing on this motion.

26 There are as yet no parties to this case other than the
27 United States. Because the titleholders to the defendant assets
28 have been held in default by the clerk, this motion has not been

1 served on them. Fed. R. Civ. P. 5(a)(2). The only potentially
2 interested parties are victims of the scheme to defraud described
3 in the complaint, who have Article III standing to become
4 claimants in this case for purposes of asserting a constructive
5 trust pursuant to Ninth Circuit case authority. United States v.
6 \$4,224,958.57, 392 F.3d 1002 (9th Cir. 2004) ("Boylan").
7 However, 2,082 of the investors are provably time-barred from
8 filing a claim to the remaining assets at this point.

9 By July 8, 2011, the government will notify the known
10 investors of this Motion by mail using a one-page summary of the
11 motion in English and Spanish. The investors will be notified
12 that they can either read this motion and the proposed Order on
13 the Internet at the United States Attorneys' Office website or
14 request to receive a paper copy of the government's Motion and
15 proposed order by mail.

16 DATE: July 8, 2011

Respectfully submitted,

17 ANDRÉ BIROTTE JR.
Acting United States Attorney
18 ROBERT E. DUGDALE
Assistant United States Attorney
19 Chief, Criminal Division
STEVEN R. WELK
20 Assistant United States Attorney
Chief, Asset Forfeiture Section

21 _____/s/_____
22 MONICA E. TAIT
Assistant United States Attorney

23 Attorneys for Plaintiff
24 United States of America
25
26
27
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 In 2008, the government seized approximately \$12 million in
3 assets from Milton Retana, Best Diamond Funding Corp., and
4 associated companies (collectively, "BDF"). Those seized assets
5 are the defendants in this *in rem* civil forfeiture case. An
6 additional set of assets (worth about \$141,361.30) is the subject
7 of a second civil forfeiture case, United States v. \$6,601.00 in
8 U.S. Currency, et al., CA 10-06831-RGK (AGRx). Separately, the
9 government has filed a motion in the \$6,601 case to have the
10 funds from that case consolidated with the funds in this case and
11 distributed to the investors.

12 The titleholders to the seized assets (including convicted
13 criminal defendant Milton Retana) are not contesting the
14 forfeiture. All that remains in the case is to settle or
15 adjudicate the interests of the fraud victims ("investors"), whom
16 the government believes collectively lost approximately \$30
17 million. Toward that goal, on February 11, 2010, this Court
18 granted the government's motion to appoint Robb Evans as Special
19 Master. Pursuant to the Order, the Special Master's team
20 pre-calculated the investors' individual losses (the "Proposed
21 Loss Amount") so that qualified investors could choose to accept
22 a pro-rata share of the defendant assets based upon the
23 pre-calculated loss figure instead of filing a court claim and
24 becoming a litigant (the "no-litigation option" or "Option A").
25 Each investor was informed that if he/she disagreed with the
26 Proposed Loss Amount and requested a recalculation of the
27 investor's Proposed Loss Amount, the investor should select
28 "Option B" on the response form. All investors timely selecting

1 Option B were informed that the date for filing a claim with this
2 Court to contest forfeiture would be extended until 30 days after
3 the Special Master responded to that investor's Option B
4 request.¹

5 In February 2011, the government moved the court for an
6 order authorizing an interim distribution to those investors
7 whose losses were finalized as of January 21, 2011 (the "Interim
8 Distribution Motion"). At that time, 1,778 investors had
9 selected Option A. In addition, 48 of the Option B investors
10 were finalized as well, because they had exhausted the time for
11 both (1) proving further losses to the Special Master, and (2)
12 filing a court claim to contest their interest in the seized
13 assets. The court approved the motion, and the Interim
14 Distribution of \$9,216,851.32 to the investors described above
15 whose losses exceeded \$0 (the "First Round investors") occurred
16 during the first week of June 2011. Declaration of Monica E.
17 Tait ("Tait Decl."), ¶ 2. These investors were sent 32.65% of
18 their finalized loss amounts, plus a pro-rata share of the
19 interest the government actually earned on the seized funds. Id.

20 As the government informed the court in the Interim
21 Distribution Motion, the remaining 400 or so investors were at
22 that time unresolved (the "Second Round investors"). The
23 government now moves for an Order granting the following relief:

25 ¹ A complete description of the materials mailed out to
26 all known investors beginning September 30, 2010 as part of the
27 Special Master process, with sample forms, is set forth in the
28 government's MOTION FOR AN ORDER APPROVING INTERIM DISTRIBUTION
(filed February 2, 2011, docket no. 82) at pp. 1-3 and
accompanying exhibits.

- 1 (a) Finalizing the Second Round investors' losses as
2 determined by the Special Master's team, and ordering
3 distribution of a pro-rata share of the remaining
4 seized funds to the Second Round investors with
5 finalized losses greater than \$0;
- 6 (b) Increasing the pro-rata distribution amount to all
7 investors to 36.93% (as compared to the 32.65%
8 previously distributed), and ordering the distribution
9 of a small catch-up payment to the First Round
10 investors so that the total amount of money they
11 receive is 36.93% of their finalized loss amounts;
- 12 (c) Permitting the government to make a distribution of
13 36.93% of loss to 10 investors with losses in Best
14 Diamond Lending ("BD Lending"), a twin Ponzi scheme
15 that Milton Retana ran immediately after the government
16 seized the subject funds and effectively halted BDF.
17 As argued below, the government believes that a
18 distribution to the BD Lending investors is equitable
19 in light of all the circumstances, even though the BD
20 Lending investors have no potentially traceable
21 interest in the money the government seized from BDF;
22 and
- 23 (d) Authorizing the government to pay an additional \$11,000
24 from the seized funds to a contractor for the purposes
25 of sending the proposed Final Distribution checks by
26 certified mail, return receipt requested, for the
27 purpose of tracking the checks in light of numerous
28 reports of missing checks from the Interim

Distribution.

A. REPORT REGARDING FINALIZING THE LOSSES FOR THE SECOND ROUND INVESTORS

There are three broad categories of Second Round investors, and the government's recommendation as to each is stated below:

First, 132 Second Round investors accepted Option A after January 21, 2011, and are now finalized. Declaration of Lillian Lee ("Lee Decl.") ¶7(a). The government recommends that each of these investors receive 36.93% of their finalized Loss Amounts, in accordance with the new distribution percentage calculated by the Special Master for this motion, which is explained in depth in section C below.

Second, 24 Second Round investors are Option B investors whose claims have been finalized after January 21, 2011. Id. ¶ 7(b). Even though these investors may disagree with the Special Master's Proposed Loss amount, the time for them to file a court claim has now passed. Id. The government recommends that each of these investors receive 36.93% of their finalized Loss Amounts.

The third category consists broadly of non-responders. This category can be subdivided as follows:

1. Non-responder, court claim barred

100 nonresponding investors received the government's notices. Lee Decl. ¶ 7(c)(1). They are time-barred from filing court claims, Id., as are the 156 Option A and B investors described in the preceding paragraphs and the 1,826 investors finalized as of the Interim Distribution Motion (for a total of 2,082 provably time-barred investors). The Proposed Loss Amounts

1 the Special Master determined for this group should be considered
2 final, and they should receive 36.93% of these final amounts.

3 2. Non-responder with questionnaire, unknown status

4 This group includes 115 nonresponders. The government re-
5 sent notices by certified and regular mail to a total of 214 non-
6 responders in January 2011, including ten in this group. Tait
7 Decl., ¶ 3; Lee Decl. ¶ 7(c)(2). As to the remainder of this
8 group, the Special Master's team either successfully communicated
9 with them about this case (but never received a written response
10 selecting either Option A or B), or the Special Master's team
11 received returned mail for them and re-mailed the notices packet,
12 or the address for the investor is simply invalid and the Special
13 Master was unable through research to find a better address (3
14 investors). Lee Decl. ¶ 7(c)(2). The government has found no
15 proof (such as a certified mail card or other proof of delivery)
16 that the notice packets to these investors were actually
17 delivered. Tait Decl., ¶ 3. However, with only a handful of
18 exceptions, the notice packets were not returned by the post
19 office (Lee Decl. ¶ 7(c)(2)), and therefore for most of this
20 group there is no proof that the notices were not delivered.
21 The government has no other address information for these
22 investors, and there is no reason to believe that sending them
23 another notice will cause any of them to respond now after
24 multiple attempts. Tait Decl. ¶ 3.

25 Each of these investors submitted a questionnaire under
26 penalty of perjury at some point after October 2008 which
27 described their alleged payments to and from BDF to either the
28 United States Postal Inspection Service ("USPIS"), the U.S.

1 Attorney's Office, or to the Special Master. Tait Decl., ¶ 4;
2 Lee Decl., ¶ 7(c)(2)(i). Based on his staff's review of the
3 questionnaires and BDF's bank and accounting records, the Special
4 Master was able to reliably calculate a proposed loss amount for
5 each of them. Id. Accordingly, the Special Master recommends,
6 and the government agrees, that these investors be issued a
7 distribution based on the 36.93% of the proposed loss amount the
8 Special Master calculated for them.

9 3. Non-responder without questionnaire, unknown status

10 This final group consists of 51 investors. Lee Decl., ¶
11 7(c)(3). As with the preceding group, the government re-sent
12 notices to 5 of them in January 2011 by certified and regular
13 mail; the remainder were either (1) contacted successfully by the
14 Special Master's team but did not respond in writing, (2) re-
15 mailed notices by the Special Master, or (3) the addresses we
16 have are simply incorrect, and no other address was located after
17 research by the Special Master and/or by a USPS representative
18 (5 investors). Id. The government has found no proof that the
19 notice packets to these investors were delivered. Tait Decl., ¶
20 5. Yet, after re-sending, mail was returned for few in this
21 group. Lee Decl., ¶ 7(c)(3). Thus, while there is no proof that
22 the mail to the remainder was delivered, the government has no
23 reason to believe the mail was not delivered to the majority in
24 this group. Unlike the preceding group of investors, however,
25 the members of this last group never submitted a questionnaire.
26 Id. The Special Master's team has deduced from the bank records
27 and BDF's accounting records that perhaps 12 of these investors
28 could have losses totaling approximately \$55,830.00 in the

1 scheme, but the team does not consider this calculation to be
2 reliable in light of the lack of a questionnaire. Id.

3 The Special Master's team has recommended based on their
4 long experience with fraud victim distributions that no
5 distribution should be sent to the "Non-responder, without
6 questionnaire, status unknown" group. Id. ¶ 7(c)(3)(i). Between
7 USPIS, the U.S. Attorney's Office, and the Special Master,
8 questionnaires have been sent at various times to all known
9 victims of the BDF scam. Tait Decl., ¶ 4. Since the 51 persons
10 in this last group are on the victim list, yet have never
11 completed a questionnaire, the Special Master has little basis
12 for determining their losses apart from the company's own
13 records, and low confidence that a distribution check will reach
14 them in any event. Lee Decl. ¶ 7(c)(3)(i). The Special Master's
15 team has generally recommended no distribution to similarly
16 situated persons in their prior victim distribution cases, and
17 they recommend the same treatment here. Id.

18 The alternative to following the Special Master's
19 recommendation would be hold back \$55,830.00 (the only potential
20 loss for this group that could be determined) from the Final
21 Distribution to all investors and either (1) keep this court case
22 open in perpetuity until these investors come forward, or (2)
23 forfeit the \$55,830.00 now, in which case these investors could
24 seek discretionary remission of these funds from the Department
25 of Justice (pursuant to 28 C.F.R. Part 9).

26 The government does not recommend either option, and instead
27 concurs with the Special Master's recommendation that no funds be
28 held back for this group. Keeping this court case open in

1 perpetuity is surely not a viable option for the Court. The
2 Special Master will seek to be discharged shortly after the Final
3 Distribution, leaving the Court with no Court-appointed official
4 to help the Court determine future claims. Although forfeiting
5 the funds is an option, there is no guarantee that the Department
6 of Justice will grant remission years in the future, and
7 forfeiting such a large amount of funds "just in case" for this
8 group of nonresponders may infuriate the remaining victims, who
9 have been waiting for the resolution of this case. As to those
10 whom we have never been able to reach, the hope that these
11 investors will ever come forward is faint. Despite the lack of
12 certified mail cards, some in this large group have undoubtedly
13 received the government's notices about this case and simply
14 failed to respond, or failed to notify the Special Master that
15 their addresses changed. Holding back funds for these investors
16 will reduce the payments to the remaining investors. For the
17 sake of the vast majority of the investors, and in the interests
18 of bringing this case to a close and minimizing future judicial
19 resources, the government submits that the "Non-responder without
20 questionnaire, unknown status" group not receive a distribution,
21 and that no funds be set aside in case any of them comes forward
22 in the future.²

24 ² Although the government does not recommend a deliberate
25 holdback for nonresponding investors, it is possible that some of
26 the seized funds will not be spent and will be forfeited to the
27 government in this case (such as from uncashed Interim and Final
28 Distribution checks). If so, the members of this group of
investors could petition the Department of Justice for a
discretionary grant of a share of such forfeited assets pursuant
to 28 C.F.R. Part 9.

1 **B. RECOMMENDATION TO INCLUDE 10 BD LENDING VICTIMS IN THE**
2 **FINAL DISTRIBUTION**

3 On October 29, 2008, the government executed search warrants
4 at BDF and seized the vast majority of the assets involved in
5 this case. BDF effectively closed as a result. One week later,
6 BDF's President, Milton Retana, instructed his employees to start
7 recruiting investors to a new company, BD Lending. Tait Decl.,
8 Exhibit 1, at 4-5 (government's memorandum of points and
9 authorities in support of Motion in Limine to present evidence of
10 BD Lending at Milton Retana's criminal trial).³ There was little
11 "new" about it apart from the name change. BD Lending used the
12 same investment contract as before, only with the name changed
13 from "Best Diamond Funding" to "Best Diamond Lending." Exhibit
14 1, p. 5. Retana told his employees to use the same fraudulent
15 sales pitch as before, i.e., that BD Lending would use investors'
16 money to buy and sell real estate and investors were guaranteed
17 monthly returns of 7%. Indeed, at least two investors actually
18 thought they were investing in BDF rather than BD Lending, having
19 learned of the investment opportunity through BDF's
20 advertisements. Id. at pp. 5-6.

21 Based on the evidence the government obtained from its
22 investigation of BD Lending, including bank records and evidence
23 from the investors and insiders, USPIIS Inspector Mark
24 Trachtenberg concluded that Retana raised money from about 16
25 investors in BD Lending. Declaration of Mark Trachtenberg, at ¶

26
27 ³ While the Motion to admit BD Lending evidence was denied,
28 Retana's success in excluding the evidence from his criminal
 trial does not prevent the Court from considering the equities of
 the BD Lending issue in connection with this motion.

1 5. The Inspector learned from Hector Menendez, a BD Lending
2 insider with signatory authority over the company's bank account,
3 that 9 BD Lending victims suffered net losses as quantified by
4 Menendez. Trachtenberg Decl., at ¶ 4(a). Inspector Trachtenberg
5 also obtained and analyzed records from the bank account BD
6 Lending used to collect funds from investors and pay "interest."
7 Id. at ¶¶ 4(b), 5. Relying on the information supplied by
8 Menendez, as transmitted by Inspector Trachtenberg and as
9 supplemented by the Inspector's analysis of the bank records and
10 information from the BD Lending investors, the Special Master's
11 staff found an additional BD Lending investor and determined that
12 he suffered a loss, for a total of 10 BD Lending investors with
13 losses totaling \$221,037.56. Lee Decl., ¶ 9.

14 The government seized no money traceable to the BD Lending
15 scheme. Therefore, unlike the BDF investors, none of the BD
16 Lending investors had a potential constructive trust claim to the
17 defendant assets under Boylan (United States v. \$4,224,958.57,
18 392 F.3d 1002 (9th Cir. 2004)), and for that reason, they were
19 not provided notification of this action or the Special Master
20 process, and they have not been promised a distribution from the
21 seized funds (although they, as well as the BDF investors, will
22 be notified that the government has filed this Motion). Even
23 though they had no right to notice in this case, the government
24 believes that the Court ought to include them in the Final
25 Distribution, for two equitable reasons.

26 First, the fact that the BD Lending investors' money is not
27 traceable to the seized assets is not determinative, because
28 tracing is not a determinative factor for the BDF investors

1 either. BDF was an active Ponzi scheme in which earlier
2 investors were repaid using the funds contributed by later
3 investors; thus, a large percentage of the BDF investors would
4 have been incapable of tracing their contributions to any of the
5 seized assets, which were confiscated as the Ponzi scheme was
6 imploding, and yet they have nevertheless received distributions
7 from the seized assets. Looking at a large-scale Ponzi
8 investment fraud scheme through the lens of tracing and
9 constructive trust is inequitable. Cf. United States v. Real
10 Property Located at 13328 and 13324 State Highway 75 North,
11 Blaine County, Idaho, 89 F.3d 551, 553-554 (9th Cir. 1996)
12 (equity demands all innocent defrauded claimants to a *res* must
13 share equally regardless of tracing fictions). BD Lending was a
14 continuation of the same scheme as BDF in the post-search warrant
15 context, with the same contract and the same *modus operandi*. The
16 only difference is that with BD Lending, the fraud proceeds were
17 not seized. It was good fortune for the BDF investors that the
18 government seized the BDF funds, and merely bad fortune for the
19 BD Lending investors that the government was unable to seize the
20 funds Retana raised after the execution of the search warrant.

21 Second, paying the BD Lending losses will only minutely
22 disadvantage the BDF investors. If the Court agrees to include
23 the BD Lending victims in the Final Distribution, all the BDF and
24 BD Lending victims would receive 36.93% of their losses. If, on
25 the other hand, the Court were to exclude the BD Lending victims
26 from the distribution, the BDF victims alone would receive 37.19%

1 of their losses - an increase of merely .26%.⁴ On the other
2 hand, for the BD Lending investors, the difference between
3 receiving a distribution of 36.93% and receiving nothing is
4 substantial by any measure. Because equity supports including
5 the BD Lending investors; the only difference between these
6 equally innocent groups of investors is due to chance; and the
7 effect on each BDF investor's payout will be so minor, the
8 government recommends that the Court include the BD Lending
9 investors in the Final Distribution.

10 **C. THE SPECIAL MASTER RECOMMENDS INCREASING THE**
11 **DISTRIBUTION PERCENTAGE TO 36.93%**

12 After the Interim Distribution was approved and the analysis
13 was largely completed as to the Second Round investors, the
14 undersigned requested that the Special Master's representatives
15 (Brick Kane and his accounting staff, headed by Lillian Lee)
16 supply a Final Distribution Plan for the remaining assets, taking
17 into account the amounts paid from the seized funds to date (the
18 \$9.2 million interim distribution, and the Special Master's fees
19 and expenses already ordered paid by the Court), and the need to
20 distribute the same pro-rata percentage to both the Second Round
21 and the First Round investors. Keeping in mind that the Special
22 Master's team may have additional work, through the Final
23 Distribution and a little beyond, before he is discharged by the
24 Court, the government requested that the revised proposed
25 distribution plan also hold back enough money to pay the
26 anticipated costs of the Special Master's work and certain

27 ⁴ In other words, by excluding the BD Lending investors, a
28 BDF investor with a \$10,000 final loss amount would receive a
\$3,719 payment, instead of a \$3,693 payment.

1 government expenses discussed below.

2 In response, Ms. Lee has supplied the chart set forth at
3 Exhibit 2 to the Lee Declaration. After deduction of the amounts
4 paid from the seized funds to date (including the Interim
5 Distribution and Special Master costs the Court previously
6 approved), and excluding a seized firearm⁵, the Court presently
7 has jurisdiction in this case over seized assets in the amount of
8 \$2,555,750.11.⁶ Tait Decl., ¶ 7. In addition, the Court has
9 jurisdiction over \$141,361.30 in the related matter, United
10 States v. \$6,601.00 in U.S. Currency, et al., CV 10-06831-RGK
11 (AGRx), and the distribution plan assumes that the Court will
12 grant the government's contemporaneous motion to include those
13 funds in the Final Distribution. By combining the cases, the
14 total remaining funds is therefore \$2,697,111.41.

15 The proposed Interim Distribution Plan would hold back the
16 following:

- 17 1. Special Master Fees and Expenses: The plan holds back
18 \$32,226.37 for fees and expenses of the Special Master
19 now pending Court approval (the hearing on these fees
20 is noticed for August 8, 2011), and projected fees and
21

22 ⁵ One of the defendants in this case is a Smith & Wesson
23 Revolver, .357 caliber, model 6866PLUS, serial number DCF7556.
24 The government does not liquidate seized firearms, and will
25 return to this court for default judgment and forfeiture as to
the firearm.

26 ⁶ This figure includes the remaining liquid assets plus the
27 value of two defendant vehicles sold pursuant to the Court's
prior order for interlocutory sale, and assumes that all
28 \$9,216,851.32 involved in the Interim Distribution has been
exhausted (even though about \$1 million in checks remained
uncashed as of July 6, 2011).

1 expenses for the period beginning April 30, 2011 of
2 \$68,038.44, for a total of \$100,264.81. Lee Decl., ¶
3 12. The undersigned agrees that the estimate is
4 reasonable. In particular, the undersigned reports
5 that the assistance of the Special Master's staff has
6 been invaluable in responding to investors' questions,
7 tracking address changes reported as a result of the
8 Interim distribution, analyzing the claims and
9 submission of investors who have never before
10 responded, and assuaging many of the victims' concerns.
11 The undersigned anticipates that this assistance will
12 again be needed for a short time after the Final
13 Distribution. This Court previously ordered that the
14 Special Master should file fee requests every 60 days.
15 Order Appointing Special Master, ¶ 16 (docket no. 36).
16 To reduce expenses from having to make multiple fee
17 applications, the Proposed Order would modify this
18 requirement and permit the Special Master to file a fee
19 motion at the time he seeks to be discharged. Proposed
20 Order, at ¶ 7.

- 21 2. Government Expenses: The plan holds back \$28,000 for
22 the following expenses. First, the court has
23 previously approved the expenditure of up to \$16,500 to
24 pay a contractor to print and mail the checks. See
25 Interim Distribution Order, at pp. 3-4 (Docket no. 97).
26 Of this amount, \$13,636.00 has so far been contracted
27 and incurred, but will not be paid until after the
28 Final Distribution, and therefore must be held back

1 from the Final Distribution. Tait Decl., ¶ 8. Second,
2 the government is requesting in this motion that the
3 Final Distribution Order allow the government to pay
4 what remains of the \$16,500 the court previously
5 approved, plus up to an additional \$11,000 from the
6 seized funds, for sending the Final Distribution by
7 certified mail in order to facilitate tracking the
8 checks, as discussed in Section D below. Finally, the
9 government requests that the Court permit the
10 government to pay \$500 out of the seized funds for its
11 expenses of publication, which is required in every
12 forfeiture case and was necessary in this case in order
13 to obtain the entry of default against the interests of
14 the perpetrators and insiders of the fraud scheme. See
15 Rule G(4), Supplemental Rules for Admiralty or Maritime
16 Claims and Asset Forfeiture Actions, Federal Rules of
17 Civil Procedure; Local Admiralty Rule C.4 (requiring
18 completed publication before default may be entered).
19 Tait Decl., ¶ 9.

20 After holding back funds for the Special Master's and
21 government's expenses, and after adding to the fund the assets
22 from the related \$6,601 case, as the government has separately
23 proposed, the total amount for the Final Distribution is
24 \$2,568,846.60. Exhibit 2 (p. 1, top ½ of spreadsheet). Because
25 the Special Master's team was conservative in crafting the prior
26 Interim Distribution Plan, the Special Master now recommends that
27 the Court increase the pro-rata distribution percentage to 36.93%

1 of finalized losses.⁷ In practical terms, if the Court agrees,
2 (a) the Second Round investors with losses greater than \$0 and
3 the ten BD Lending investors would receive a single check
4 representing 36.93% of their finalized losses, and (b) the First
5 Round investors with losses greater than \$0 would receive a
6 second check sufficient to bring their total distribution amount
7 up to 36.93%.

8 **D. THE GOVERNMENT REQUESTS AUTHORITY TO PAY UP TO AN**
9 **ADDITIONAL \$11,000 FROM THE SEIZED FUNDS TO SEND THE**
10 **FINAL DISTRIBUTION CHECKS VIA CERTIFIED MAIL**

11 The Interim Distribution checks were not sent by certified
12 mail. Sending by certified mail is very expensive (\$5.40 each
13 piece for the postal fees alone, without factoring in the
14 additional labor for tracking the mailings), and the government
15 believed it was not cost-effective for the Interim Distribution
16 since the government had experienced disappointing delivery rates
17 using certified mail in this case during the investor
18 notification process. Tait Decl., ¶ 10. Since the Interim
19 Distribution checks were mailed, however, the government has
20 received numerous reports of missing and undelivered checks. Id.
21 Even though the checks were mailed during the first week of June
22 2011, 11% of the checks mailed out (195 checks totaling about \$1
23 million) had not been cashed by July 6, 2011. Id. These factors
24 lead the undersigned to conclude that a tracking system is a
25 worthwhile expense to incur for the Final Distribution. Id.

26 The current contract for printing and mailing the Interim

27 ⁷ This figure assumes that the Court approves the inclusion
28 of the BD Lending investors. If not, the Final Distribution pro-
rata distribution, to the BDF investors only, would increase to
37.19%.

1 and Final Distributions costs \$13,636. Tait Decl., ¶ 11. While
2 the Court has already approved the payment of up to \$16,500 from
3 the seized funds for printing and mailing, the \$2,864 difference
4 is insufficient to cover even the post office fees for certified
5 mail (\$10,800 for about 2,000 pieces). Id. Accordingly, the
6 Proposed Order would permit the government to spend an additional
7 \$11,000 from the seized funds for certified mail service, on top
8 of the \$16,500 the Court has already approved; according to the
9 Marshals' Service's representative, this additional amount should
10 be enough for certified mail and tracking. Id.

11 **E. THE PROPOSED ORDER**

12 As with the Interim Distribution Order this Court has
13 already approved, the proposed Final Distribution Order provides
14 for the provisional dismissal of the defendant funds that are
15 distributed. The government is entitled to dismiss assets from
16 this action because no answers have yet been filed. Fed. R. Civ.
17 P. 41(a)(1). The proposed Order combines the dismissal of such
18 assets as are successfully paid as part of the Final Distribution
19 with an exercise of this Court's *in rem* jurisdiction over the
20 funds in the course of assuring that no investor obtains more
21 than his or her fair share. Cf. United States v. \$4,224,958.57,
22 392 F.3d 1002, 1005 (9th Cir. 2004) ("Boylan") (discussing
23 court's role in administration of seized funds where court has
24 found constructive trust to exist). If checks to investors are
25 returned uncashed, the funds can be restored to the defendant
26 assets for future forfeiture.

27 The Proposed Order is the proper course at this time.
28 First, there is no danger that the titleholders of the seized

1 assets could object to the distribution. The titleholders of the
2 seized assets are in default, having never filed any claims to
3 contest forfeiture. Moreover, Milton Retana and his wife (the
4 likely true owners of all the seized assets) have affirmatively
5 released all right, title and interest in the seized assets to
6 the government. See Docket no. 22 (copies of releases).

7 Second, none of the investors has filed a court claim to
8 contest forfeiture, and 2,082 investors are provably time-barred
9 from doing so. See supra pp. 3-4. The remainder are barred by
10 the government's prior publication of notice of this action. The
11 investors were notified in December 2009 that the government
12 intended to seek to distribute the seized funds pro-rata
13 according to the Special Master's calculations, and no objections
14 were filed at that time opposing the principle of pro-rata
15 distribution. All investors will have been sent notice of this
16 Motion and the proposed Final Distribution Order in advance of
17 the date designated for hearing of this Motion.

18 Finally, even if one of the few investors who never received
19 the notices were to file a court claim, the only claim available
20 is the imposition of a constructive trust over a portion of the
21 seized assets. Boylan, 392 F.3d at 1004-5. However, imposition
22 of a constructive trust (which requires proof of tracing) has
23 been ruled inappropriate in a large-scale Ponzi investment fraud
24 scheme like this case. United States v. Real Property Located at
25 13328 and 13324 State Highway 75 North, Blaine County, Idaho, 89
26 F.3d 551, 553-554 (9th Cir. 1996) (equity demands all innocent
27 defrauded claimants to a *res* must share equally regardless of
28 tracing fictions). Accordingly, the best any investor is likely

1 to obtain even if he were to file a Court claim is the return of
2 a pro-rata share of his net loss, which is exactly what the
3 government is proposing here.

4 Based upon all the above, the government recommends the
5 proposed Final Distribution Order. The Order requires the U.S.
6 Marshals Service ("USMS") to release the amounts indicated on
7 Exhibit 3 to the Lee Declaration to the approximately 2,000
8 investors with losses greater than zero identified therein, via a
9 contractor previously hired to perform the printing and mailing.
10 The payment would be made by check to the address listed on the
11 Sealed Final Distribution List (although the government will be
12 able to make address changes as reported by the investors or the
13 post office). Finally, if any checks paid pursuant to the
14 Interim Distribution Plan are returned, the USMS will attempt to
15 pay those funds again to the designated investor upon direction
16 of an attorney for the government at any time before the entry of
17 a final judgment in this case.⁸

24
25 ⁸ The government anticipates that it will return to the
26 Court one more time to seek default judgment and forfeiture as to
27 any assets remaining after the Final Distribution (*i.e.*, uncashed
28 checks). If such funds are forfeited, this office will inform
any victims who were not successfully paid and who later contact
the government about this case that they may petition the
Department of Justice to exercise its discretion to grant a share
of what was forfeited, pursuant to 28 C.F.R. Part 9.

1 **F. CONCLUSION**

2 For the foregoing reasons, the proposed Final Distribution
3 Order should be granted.

4 DATE: July 8, 2011

Respectfully submitted,

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13 /s/
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